

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket Nos. 34413/34474/34475

STATE OF IDAHO,)	2008 Unpublished Opinion No. 667
)	
Plaintiff-Respondent,)	Filed: October 1, 2008
)	
v.)	Stephen W. Kenyon, Clerk
)	
DAVID ALLEN PATTERSON,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Sixth Judicial District, State of Idaho, Bear Lake County. Hon. Don L. Harding, District Judge.

Sentences entered upon judgment of conviction for perjury and possession of a controlled substance, vacated. Case remanded for resentencing.

Molly J. Huskey, State Appellate Public Defender; Heather M. Carlson, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

WALTERS, Judge Pro Tem

David Allen Patterson entered into an agreement with the State to plead guilty to a charge of perjury and to a charge of possession of a controlled substance. He appeals from the judgment of conviction entered upon his guilty pleas, contending that the State breached the plea agreement. Because we conclude that the prosecutor did not honor the plea agreement, we vacate Patterson's sentences and we remand the case for resentencing.

I.

BACKGROUND

The State charged Patterson with four crimes in three separate cases, consisting of two counts of perjury, one count of delivery of a controlled substance within 1,000 feet of a school, and one count of possession of a controlled substance (methamphetamine). Pursuant to a plea agreement, Patterson pled guilty to one count of perjury and to possession of methamphetamine

and the State dismissed the two remaining charges. The plea agreement also included a provision that, at sentencing, “the State agrees to remain silent and not make any sentencing recommendation, and further that the Defendant is free to argue Sentence recommendations.”

At the sentencing hearing, Patterson requested that the district court place him on probation or retain jurisdiction. Patterson called his brother, Carl, as a witness to testify that Patterson had worked for him in the past and that he would hire Patterson again if Patterson were released on probation, and would make sure that Patterson lived up to the terms and conditions of probation. The prosecutor cross-examined Carl, without objection, challenging whether Patterson had actually ever worked for his brother and whether Carl would really employ Patterson if he were placed on probation, and about information received by the prosecutor’s office that Carl had a “rule that [his] employees have to smoke marijuana.” After Carl testified, counsel for Patterson asked the court to impose probation or allow Patterson to participate in retained jurisdiction. The prosecutor then indicated he would call a police officer as a witness to controvert some statements made by Patterson that appeared in the presentence report. The prosecutor then changed his mind when Patterson objected on the ground that the State had agreed to remain silent at the sentencing hearing. After some dialogue with the court, the prosecutor stated: “I won’t call any witnesses, but at the same time when I weigh what they are going to say, based upon the recommendation of the presentence investigator, I have decided it is probably not worth going down that road.”

The district court imposed a sentence to the custody of the Board of Correction, without placing Patterson on probation and without entering an order retaining jurisdiction. Patterson filed this appeal. He argues that the State violated the terms of the plea agreement by cross-examining Patterson’s brother, Carl, and by alluding with approval to the presentence investigator’s recommendation, which had recommended that Patterson be sentenced to a period of incarceration. For relief, Patterson requests that his convictions for perjury and possession of methamphetamine be set aside and his case remanded to the district court for a new sentencing hearing in front of a different district judge, with the State remaining silent at sentencing.

II. ANALYSIS

It is well established that an agreement by the prosecutor to refrain from making a sentencing recommendation in exchange for the defendant's guilty plea is a promise which must be kept. *Santobello v. New York*, 404 U.S. 257, 260 (1971); *State v. Jafek*, 141 Idaho 71, 106 P.3d 397 (2005); *Dunlap v. State*, 141 Idaho 50, 63, 106 P.3d 376, 389 (2004); *State v. Barnett*, 133 Idaho 231, 233-34, 985 P.2d 111, 113-14 (1999). Since a guilty plea waives certain constitutional rights, a defendant is constitutionally entitled to relief when the state breaches a promise made to him in return for a plea of guilty.

This rule is based upon the principle that a guilty plea, to be valid, must be both voluntary and intelligent. "Thus, only when it develops that the defendant was not fairly appraised for its consequences can his plea be challenged under the Due Process Clause." *Mabry v. Johnson*, 467 U.S. 504, 509 (1984). In other words, "when the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand." *Id.*

State v. Robbins, 123 Idaho 527, 540, 850 P.2d 176, 189 (1993) (quoting *State v. Rutherford*, 107 Idaho 910, 693 P.2d 1112 (Ct. App. 1985)). A breach of such an agreement, whether intentional or inadvertent, will necessitate resentencing or allowance of withdrawal of the guilty plea. *Id.*; *State v. Seaman*, 125 Idaho 955, 877 P.2d 926 (Ct. App. 1994); *Rutherford*, 107 Idaho 910, 693 P.2d 1112. Whether a plea agreement has been breached is a question of law to be reviewed by this Court *de novo*, in accordance with contract law standards. *Jafek*, 141 Idaho at 73, 106 P.3d at 399; *Barnett*, 133 Idaho at 234, 985 P.2d at 114.

Because a breach of a plea agreement is fundamental error, a claim of such a breach may be considered for the first time on appeal if the record provided is sufficient for that purpose. *Jafek*, 141 Idaho at 74, 106 P.3d at 400; *State v. Wills*, 140 Idaho 773, 775, 102 P.3d 380, 382 (Ct. App. 2004); *State v. Jones*, 139 Idaho 299, 301, 77 P.3d 988, 990 (Ct. App. 2003); *State v. Fuhrman*, 137 Idaho 741, 744, 52 P.3d 886, 889 (Ct. App. 2002); *State v. Brooke*, 134 Idaho 807, 809, 10 P.3d 756, 758 (Ct. App. 2000). Here, the transcript of the district court proceedings adequately discloses the terms of the plea agreement, and we are therefore able to address Patterson's assertions of prosecutorial breach.

Patterson claims first that the prosecutor violated the plea agreement's requirement that the prosecutor remain silent during the sentencing hearing when the prosecutor cross-examined

Carl concerning the viability of Patterson's probation plans. In this regard, we note that there is some latitude allowed a prosecutor notwithstanding an agreement to make no sentencing recommendation or to stand entirely silent as part of a plea-bargained agreement. An effort by the State to provide relevant factual information or to correct misstatements in the presentence report is not tantamount to taking a position on sentencing and will not violate the plea agreement. *See, e.g., United States v. Block*, 660 F.2d 1086 (5th Cir. 1981); *United States v. Garcia*, 544 F.2d 681 (3rd Cir. 1976). Similarly, a prosecutor's promise to stand mute does not prevent him from speaking out if misleading statements are made to the court at the sentencing hearing. *United States v. Johnson*, 582 F.2d 335 (5th Cir. 1978). In *Block*, the court stated:

A prosecutor has a duty to insure that the court has complete and accurate information concerning the defendant, thereby enabling the court to impose an appropriate sentence. Thus if an attorney for the Government is aware that the court lacks certain relevant factual information or that the court is laboring under mistaken premises, the attorney, as a prosecutor and officer of the court, *see Smith v. United States*, 375 F.2d 243, 247 (5th Cir.), *cert. denied*, 389 U.S. 841, 88 S. Ct. 76, 19 L. Ed. 2d 106 (1967); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir.), *cert. denied*, 381 U.S. 935, 85 S. Ct. 1767, 14 L. Ed. 2d 700 (1965), has the duty to bring the correct state of affairs to the attention of the court.

Block, 660 F.2d at 1091.

Accordingly, we conclude that the prosecutor's cross-examination of Patterson's brother concerning the probation plan was a reasonable attempt to bring accurate information to the attention of the sentencing court. The prosecutor's activity in this regard did not violate the prosecutor's agreement not to make a sentencing recommendation.

However, the prosecutor's announced decision that he would not call any witnesses after weighing "what they are going to say, *based upon the recommendation of the presentence investigator*," stating that he had "decided it is probably not worth going down that road" (emphasis supplied), clearly was an endorsement of the investigator's recommendation that Patterson be incarcerated rather than released on probation. This was an implied disavowal of the prosecutor's agreement to remain silent and not to make a sentencing recommendation. A prosecutor may not circumvent a plea agreement through words or actions that convey a reservation about a promised recommendation, nor may a prosecutor disavow the recommendation as something that the prosecutor no longer supports. *Wills*, 140 Idaho at 775, 102 P.3d at 383; *Jones*, 139 Idaho at 302, 77 P.3d at 991. Patterson was entitled to have the prosecutor's conduct conform to what Patterson reasonably understood to be the bargain--that

the State would make no recommendation to the district court. The prosecutor's endorsement of the sentencing recommendation in the presentence investigation report was fundamentally at odds with what the State had agreed to do under the plea agreement. *See State v. Lankford*, 127 Idaho 608, 617, 903 P.2d 1305, 1314 (1995). Accordingly, we conclude that the prosecutor breached the plea agreement and, as a result, Patterson was denied the benefit of his bargain. The relief prayed for on appeal will be granted.

III.

CONCLUSION

The prosecutor breached the plea agreement by disavowing the State's promise not to make a recommendation during argument at the sentencing hearing. Therefore, we vacate Patterson's judgment of conviction and sentences and remand the case for resentencing by a different judge.

Chief Judge GUTIERREZ and Judge PERRY **CONCUR.**